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19 UNITED STATES DISTRICT COURT  
20 SOUTHERN DISTRICT OF CALIFORNIA

21 MS. L, et al.,

22 Petitioners-Plaintiffs,

23 vs.

24 U.S. IMMIGRATION AND CUSTOMS  
ENFORCEMENT, et al.,

25 Respondents-Defendants.  
26  
27  
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Case No. 18cv428 DMS MDD

**DEFENDANTS' OPPOSITION TO  
PLAINTIFFS' MOTION TO  
ENFORCE SETTLEMENT  
AGREEMENT FOR CLASS  
MEMBERS WHO HAVE NOT  
SUBMITTED EXECUTED WAIVER  
FORMS**

1       **I. INTRODUCTION**

2       Plaintiffs' motion rests on a distortion of Defendants' position. Plaintiffs  
3 contend that the government is trying to avoid its obligation to provide the  
4 procedures to which it agreed in the settlement agreement to individuals who are  
5 entitled to them. That is flatly incorrect. Defendants have expressed no intention of  
6 avoiding their obligations to provide these procedures. Rather, the government  
7 simply contends that before it proceeds to provide any individual settlement class  
8 member with procedures under the settlement agreement, each settlement class  
9 member should first have the opportunity—with the assistance of class (or other)  
10 counsel—to make a knowing and voluntary election regarding his or her settlement  
11 rights. And indeed, the government is entitled to know each class member's clear  
12 and informed wishes before it acts and works to benefit that class member. If the  
13 Court were to grant Plaintiffs' motion, the government would be forced to provide  
14 settlement procedures to settlement class members without first ensuring that he or  
15 she had received notice of his or her right to those procedures from class counsel and  
16 had the opportunity to make an election on how to proceed.

17       The Court should not require Defendants to proceed in this manner, but should  
18 instead deny Plaintiffs' motion. In reality, many class members who were released  
19 from ICE custody were served with a notice to appear rather than remaining subject  
20 to an expedited removal order and thus are unaffected by the settlement agreement.  
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1 Moreover, most if not all of those individuals should have received the class notice  
2 and election form from class counsel, and have therefore had the opportunity to make  
3 an election regarding the settlement agreement. For the remaining individuals—if  
4 any—the Court should require that if either Plaintiffs or Defendants identify an  
5 individual who is entitled to settlement procedures but has not submitted an election  
6 form, the government will ensure that class counsel is notified to provide that  
7 individual with a settlement election form to allow him or her to make an election  
8 one way or the other with the assistance of counsel. The government would request  
9 that counsel then submit the form within a specified period of time. Once an election  
10 is made and the form is submitted to the government, then the government will honor  
11 that election. The parties can then work together to track these individuals through  
12 the use of the settlement election forms.

## 17 II. ARGUMENT

18 The settlement agreement states the procedures that the parties agreed address  
19 the asylum claims of settlement class members. Agreement, ECF No. 247, at 32-38.  
20 In seeking approval from this Court for the settlement agreement, the parties also  
21 prepared a “Notice of Proposed Settlement and Settlement Election Form,” ECF No.  
22 247-1, which notifies class members of the rights available to them under the  
23 settlement, and provides each class member the opportunity to elect either: 1) that  
24 he or she wishes to remain in the United States and seek relief in accordance with  
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1 the agreement; or 2) that he or she wishes to waive his or her rights under the  
2 agreement and be removed from the United States. *See* Election Form, ECF No. 247-  
3 1 at 3. The agreement provides that “[c]lass counsel are responsible for determining  
4 a class member’s intentions related to waiver of the procedures set forth below.”  
5 Agreement, ECF No. 247, at 32. And the election form directs that the “form must  
6 be read to the class member in a language that he/she understands[, and t]he class  
7 member must indicate which option he/she is choosing by signing the appropriate  
8 box below.” Settlement Election Form, ECF No. 247-1 at 3.

11 Thus, the procedures developed and agreed to by the parties clearly evidence  
12 an intent that class counsel should ensure that each class member has the opportunity  
13 to make an affirmative election whether or not to accept the rights afforded under  
14 the settlement agreement. And these procedures make sense, given that one feature  
15 of the claims underlying the settlement agreement was a repeated assertion by  
16 Plaintiffs that government actors coerced or mislead them into giving up their rights  
17 to pursue asylum claims. Adhering to a procedure in which class counsel is  
18 responsible for determining the election of each and every settlement class member  
19 before any action is taken in his or her case ensures that the government can proceed  
20 without concern that such allegations will continue to arise.

25 Plaintiffs’ motion does not address any benefit of ensuring that each  
26 settlement class member makes a knowing and voluntary election regarding the  
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1 settlement procedures, and instead largely focuses on a strawman argument that  
2 Defendants never made and this Court need not address. Specifically, Plaintiffs  
3 devote the majority of their motion to arguing that, under the settlement agreement,  
4 the government is obligated to provide settlement procedures to individuals who are  
5 members of the settlement class, even where those class members have not  
6 submitted a settlement election form. Plaintiffs also contend that “the Government  
7 now takes the position that failure to submit a signed form amounts to a waiver of  
8 rights under the settlement . . .” Mem. 7.

11 Those characterizations are baseless—they do not reflect any position of the  
12 government. The government does not object to providing the procedures to which  
13 it agreed under the settlement to individuals who are entitled to them, and has no  
14 intention of simply ignoring its obligations for an individual who it identifies as a  
15 settlement class member who has not submitted an election form. Rather, what the  
16 government objects to is being required to track down potential class members and  
17 provide them with procedures under the settlement agreement without first ensuring  
18 that he or she has had the opportunity to make a knowing election to do so. Thus,  
19 the question here is not whether settlement class members are entitled to procedures,  
20 but what must happen to trigger the government’s obligation to provide those  
21 procedures. It is class counsel’s obligation to ensure that each individual is provided  
22 notice of his or her rights under the agreement, and to obtain his or her election  
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1 regarding the settlement procedures. The government's obligation is to provide those  
2 procedures or facilitate removal as elected by the class members, and to ensure that  
3 class counsel is notified about any class member who comes to the government's  
4 attention having not submitted an election form, so that class counsel can provide  
5 the individual with notice of his or her rights and the individual has the opportunity  
6 to make an election whether to pursue those rights.  
7

8         Understanding the requirements of the agreement in this way then allows for  
9 a cooperative solution that also ensures that all settlement class members have the  
10 opportunity to make a knowing and voluntary election regarding their settlement  
11 rights. Consistent with the parties' agreement, Defendants have already provided  
12 class counsel "with any known contact information for all nondetained Settlement  
13 Class members." Unopposed Motion for Preliminary Approval of Proposed  
14 Settlement, ECF No. 247, at 20-21. Class counsel also have taken numerous steps to  
15 provide the notice to settlement class members and other interested parties who may  
16 come into contact with settlement class members. *Id.* at 20-25. These processes  
17 allow class counsel various opportunities to fulfill their responsibility "for  
18 determining a class member's intentions related to waiver of the procedures set forth  
19 [in the Agreement]." Agreement, ECF No. 247 at 32. To the extent any settlement  
20 class member may not receive notice through these methods and therefore fails to  
21 submit a settlement election form, but comes to the attention of the government the  
22

1 government will not treat the failure to submit a form as waiver and simply remove  
2 the individual, but also will not unilaterally impose settlement procedures on that  
3 individual; rather, the government will bring this individual to the attention of class  
4 counsel and request that class counsel obtain a settlement election form from that  
5 individual. Notably, the government has already been doing so for detained cases.  
6 This joint approach also ensures that both parties can easily track settlement class  
7 members and their elections with regard to the settlement procedures. It also shows  
8 why the data reporting requested by Plaintiffs in their motion is onerous and  
9 unnecessary, given that the parties prepared and agreed to a form that allows for  
10 clear and simple tracking by both parties.

14       **III. CONCLUSION**

15           For all of the above reasons, the Court should deny Plaintiffs' motion. Instead  
16 the Court should confirm that class counsel is responsible for ensuring that each  
17 settlement class member has the opportunity to make a knowing and voluntary  
18 election whether to proceed with his or her rights under the settlement agreement,  
19 and that where an individual has made no such election, the government will not  
20 treat this as a waiver, but will reach out to class counsel and ask them to obtain a  
21 settlement election form for that individual before taking any further action in that  
22 individual's asylum case.

1 DATED: February 6, 2019

Respectfully submitted,

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28

1                   **CERTIFICATE OF SERVICE**

2 IT IS HEREBY CERTIFIED THAT:

3                   I, the undersigned, am a citizen of the United States and am at least eighteen  
4 years of age. My business address is Box 868, Ben Franklin Station, Washington,  
5 DC 20044. I am not a party to the above-entitled action. I have caused service of  
6 the accompanying **DEFENDANTS' OPPOSITION TO PLAINTIFFS'**  
**MOTION TO ENFORCE SETTLEMENT AGREEMENT FOR CLASS**  
**MEMBERS WHO HAVE NOT SUBMITTED EXECUTED WAIVER**  
**FORMS** on all counsel of record, by electronically filing the foregoing with the  
10 Clerk of the District Court using its ECF System, which electronically provides  
11 notice.

12                  I declare under penalty of perjury that the foregoing is true and correct.

13                  DATED: February 6, 2019`

14                  *s/ Sarah B. Fabian*  
Sarah B. Fabian

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